

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition of GCB Communications,)	WC Docket No. 11-141
Inc. d/b/a Pacific Communications)	
And Lake Country)	
Communications, Inc. for)	
Declaratory Ruling)	
)	

**REPLY COMMENTS OF GCB COMMUNICATIONS, INC. d/b/a PACIFIC
COMMUNICATIONS AND LAKE COUNTRY COMMUNICATIONS, INC.**

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Petitioners herein, GCB Communications, Inc. d/b/a Pacific Communications and Lake Country Communications, Inc., pursuant to the Commission's Public Notice,¹ hereby submit their Reply Comments in this matter. U.S. South Communications, Inc. (hereafter "USSC") has submitted an Opposition² which in addition to opposing the *Petition*,³ requests alternate relief which would, if granted, undermine the Commission's entire dial-around compensation ("DAC") regime. No party other than USSC opposed the Petition. The American Public Communications Council and APCC Services, Inc., filed comments ("APCC Comments.") in support of the Petition. These Reply Comments are largely directed at the Opposition filed by USSC.

¹ Public Notice, "Wireline Competition Bureau Seeks Comment on Petition to Clarify Payphone Service Providers' Responsibilities With Respect To the Transmission of Payphone-Specific Coding Digits," DA 11-1450 (Released August 31, 2011).

² Opposition of U.S. South to Petition for Declaratory Ruling (hereafter "Opposition") (filed August 31, 2011)

³ Petition of GCB Communications, Inc. d/b/a Pacific Communications And Lake Country Communications, Inc. for a Declaratory Ruling Petition to Clarify Payphone Service Providers' Responsibilities With Respect To the Transmission of Payphone-Specific Coding Digits In Order To Receive Per Call Dial Around Compensation For Completed Calls (filed August 9, 2011) (hereafter "*Petition*").

INTRODUCTION AND SUMMARY

The *Petition* resulted from the Ninth Circuit's decision in *GCB*⁴ reversing a District Court decision⁵ requiring USSC to pay unpaid DAC owed to Petitioners. The Ninth Circuit made two errors which, if left uncorrected, will undermine the entire DAC regime adopted by the Commission under Section 276. The first error is the Court's interpretation of the Commission's rules to find that PSPs have the obligation to ensure that coding digits are transmitted by the provisioning LEC. The Court's error is a direct and utter misreading of the Commission's rules that turns on the Court's misunderstanding of what the Commission meant by "transmission" and is a straightforward matter on which the Commission can rule. The Commission understands, and its orders make clear, that PSPs have no visibility into the network, no knowledge of the call path, much less any relationship with downstream carriers. PSPs in fact play no role whatsoever in the transmission of coding digits. Their responsibility ends with the ordering of a payphone line. All PSPs can do is order payphone lines, and obviously the Commission could not and did not intend for them to do anything else (a point that, as discussed below, USSC itself comes close to conceding). At that point it is the LEC and only the LEC who can transmit coding digits, and ensuring their transmission into the network is solely the LEC's responsibility.

The Court's second error relates to responsibilities of the carriers in the call-path downstream from the LEC. Despite clear, controlling language in the applicable Commission orders, and the Commission's obvious intent, the Court treated as an "open issue" whether a Completing Carrier must pay DAC for payphone-originated calls absent receipt of payphone-specific coding digits. This is just wrong. There is no open question under the Commission's rules and orders on this point. The Commission rules and orders are absolutely explicit that coding digits are *not* a prerequisite to compensation. Rather they are a *tool* that completing carriers can use to help comply with their obligation to compensate PSPs on all calls.

In the *Petition*, a ruling is requested as to whether

⁴ *GCB Comms v. U.S. South Comms.*, No. 09-17646 (9th Cir. April 29, 2011) (hereafter "*GCB*").

⁵ *GCB Communications, Inc. v. U.S. South Communications, Inc.*, No.2:07-cv-02054 (D.C.AZ, 2009).

If the PSP has ordered a payphone line from the serving LEC, is the completing carrier obligated to pay the PSP per-call compensation for completed coinless calls made from that payphone line, and the PSP has no responsibility for the transmission of and receipt of payphone specific coding digits by the carriers in the call path.⁶

The question posed in the first part of the *Petition* encapsulated the two separate errors of the Appeals Court by asking the question whether (1) once a PSP has ordered a payphone line, (2) the completing carrier must pay compensation. Once that question is answered yes, the declaration contained in the second part of the issue referred by the District Court makes explicit what is already clear once the question in the first part is answered: the Completing Carrier must pay compensation regardless of whether it received payphone-specific coding digits.

The *Petition* raises issues regarding the interpretation and meaning of specific language that appears in various Commission Orders. The *Petition* developed at some length the history of that language and the specific context in which the language was used to provide the framework for interpreting it. The *Petition* explained that given that framework and history, the way in which networks operate, the PSPs' lack of visibility and/or control over carrier networks, the statutory purposes of Section 276, and the scheme adopted by the Commission, the Commission clearly meant to assign to carriers -- under the current rules, Completing Carriers -- the responsibility for implementing accurate payphone call tracking systems and paying for all completed calls, whether or not the calls are accompanied by payphone-specific coding digits when they reach the Completing Carrier's switch. The Commission assigned to PSPs only the responsibility of ordering payphone lines from the serving LEC.

The Opposition attempts to some degree to discuss the history and context of the Commission's payphone and related orders.⁷ But its assertions regarding the significance of the

⁶ The District Court's Referral Order is attached to the Petition as Exhibit 1.

⁷ The *Petition* and the Opposition cite a number of orders. For the convenience of the Commission and ease of proceeding, we set forth in this footnote the major Commission and staff orders cited in this document. The short cites for each of them is set forth in bold typeface for ease of reference. *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 20541 (hereafter "**September 20, 1996 First Report and Order**"); *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the*

Commission's actions and the context in which those actions occurred are way off the mark. Moreover, the Opposition's discussion of the specific language at issue and which the Court of Appeals construed is particularly deficient. And the Opposition's only attempt to address the consequences for PSPs, for whose primary benefit the compensation provision of Section 276 was enacted,⁸ of adopting USSC's interpretation of the language is to assert, incorrectly, that the PSPs will not be left without a remedy because the PSPs can bring an action at the Commission in those instances where the LEC fails to transmit payphone-specific coding digits.

USSC, as we explain below, has in its request for alternative relief in essence broken out the second part of the question and part of the declaration in the issue referred by the District Court by asking the Commission to rule that the Completing Carrier is relieved of its duty to pay compensation if it did not receive payphone-specific coding digits, irrespective of whether the PSP has complied with its obligation to order the payphone line. In addition to denying USSC's request for relief, the Commission can and should answer the question as posed in the *Petition* in the affirmative, and thereby correct both of the Court's errors in a single ruling. The Commission should also issue the declaration sought in the second half of the referral from the Court.

In the discussion below, we address first the conflicting positions of Petitioners and USSC on how the Commission should respond to the request for a Commission declaration concerning the obligation of Completing Carriers to pay DAC on calls that do not have

Telecommunications Act of 1996, Order on Reconsideration, 11 FCC Rcd 21233 (1996) ("**November 8, 1996 First Payphone Reconsideration Order**"); *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 16387 (1997) ("**October 7, 1997 Bureau Waiver Order**") *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd 4998 (1998) ("**March 9, 1998 Coding Digit Waiver Order**"); *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd 10893 (1998) ("**April 3, 1998 Per Phone Waiver Order**"); *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975 (2003) ("**September 30, 2003 Revision Order**").

⁸ The Court of Appeals acknowledged that "Congress was especially concerned about full and fair compensation to payphone operators (citing Section 276(b)(1)(A)) and that the FCC has issued a number of orders designed to assure that the Congressional intent is carried out". *GCB*, Slip Op. at 9-10 (footnotes omitted).

payphone-specific coding digits. Embedded in that discussion is a related and critical point; a Completing Carrier must have an accurate system for tracking calls from payphones, and that accurate system will track calls irrespective of whether the calls contain coding digits. Then Petitioners address the remaining issues, including the total inadequacy and impracticality of what USSC proffers—the right to bring a complaint against a LEC that fails to send payphone-specific coding digits into the network— as a sufficient remedy and the PSP’s responsibilities under the Commission’s dial-around regime.

I. THE ISSUE RAISED BY THE *PETITION* AND USSC IS A CARRIER’S DUTY TO HAVE AN ACCURATE CALL TRACKING SYSTEM AND PAY BASED ON THAT ACCURATE SYSTEM, INCLUDING FOR CALLS NOT ACCOMPANIED BY PAYPHONE-SPECIFIC DIGITS

According to USSC, the *Petition* focused incorrectly only on whether the PSP has satisfied its regulatory obligation by ordering a payphone line, which in turn triggers a LEC’s obligation to provide Flex ANI digits. The *Petition*, as discussed above, also raised the issue of whether a Completing Carrier must pay compensation on payphone calls even though the calls do not contain payphone-specific coding digits. Yet the Opposition has in several places recast the issue by asking whether a Completing Carrier may “permissively rely on FLEX ANI to identify payphone calls consistent with the long-standing mandate that carriers deploy an ‘accurate’ payphone call tracking system.” Opposition i, 3.

USSC is wrong on both counts. As explained above and as USSC acknowledges elsewhere in the Opposition, *e.g.*, 2 (citing GCB, Slip Op. at 5583)

The issue before this Commission is the same as that addressed by the Court of Appeals . . . “whether U.S. South was required to pay GCB for completed coinless payphone calls –dial-around calls- if U.S. South did not receive coding digits that would identify the Calls as GCB payphone calls.”

As explained above, while the PSP’s role, or actually lack of a role, in transmitting Flex ANI is one of the two issues encapsulated by the *Petition*, and grant of the *Petition* is necessary to correct the Court’s error on that point,⁹ Petitioners agree with USSC that a ruling on the question set forth above is equally necessary. If the uncertainty created by the Court’s error on this point

⁹ See Section I (B), *infra*.

is left unaddressed, the Commission's entire DAC scheme will be undermined. The result of expressly adopting USSC's view would be worse still—doing so would eviscerate the DAC regime and would violate the Commission's mandate under Section 276.

A. Accurate Call Tracking Is Required

The foregoing discussion makes clear that the issue in front of the Commission is not whether a Completing Carrier “may permissively rely on FLEX-ANI,” or even whether a Completing Carrier may rely on FLEX ANI to have an “*accurate*” call tracking system; all parties agree that a Completing Carrier may do so. *E.g.*, Opposition, n. 15; *Petition* 13. The issue in this regard is the responsibility of a Completing Carrier to have an accurate, instead of an *inaccurate*, payphone call tracking system—no matter whether the Completing Carrier relies on FLEX ANI, lists of payphones obtained from LECs (“LEC lists”), the Completing Carrier's own independent data bases, or a combination of these, or any other tracking system. Whatever the basis of the call tracking system, as USSC itself observes, to be consistent with the Commission's “longstanding mandate,” the call tracking system must be “accurate.”¹⁰ And here the Commission has been clear; it is the Completing Carrier's responsibility to deploy and maintain that accurate tracking system. The Commission's regulations provide that

¹⁰ On the undisputed facts of the case, USSC's call tracking system was not accurate. USSC failed to track and pay for calls which all parties agreed originated from Petitioners' payphones. The District Court found that USSC had failed to pay for the calls it received from Petitioners, and USSC did not dispute this fact. Indeed, USSC admitted it but defended on the ground that it had not received the payphone-specific coding digits. The Court of Appeals reversed not on the basis of any finding that the USSC call tracking system was accurate, but because the Court of Appeals disagreed with the District Court about the meaning of the very language now before the Commission for interpretation. Although the Opposition repeatedly asserts that USSC “has done everything required of them,” Opposition i, 4, no amount of recitation by USSC can change the fact there has been no finding that USSC's call tracking system was accurate and that USSC in fact did not pay on all of the calls from Petitioners' payphones, so its system was inaccurate.

Moreover, USSC's repeated assertions that it did everything right and its attempts to portray itself as a model of what a Completing Carrier should be could potentially threaten an impartial review of the serious legal issues raised in this matter. Accordingly, although Petitioners recognize that the *Petition* is *not* about what happened at trial, or which of the parties failed to introduce evidence or meet that party's burden on a particular issue, Petitioners disagree with many of the Opposition's characterizations of what transpired at trial and what is in the record of this case. Petitioners do intend to respond as appropriate and point out material in the record of the proceeding. Moreover, in some instances the history of the proceeding and/or its posture at trial will help illustrate the far reaching effects of the ruling that USSC seeks, and Petitioners do intend also to discuss the history of the proceedings to that degree.

Each *Completing Carrier shall establish* a call tracking system that *accurately* tracks coinless access code or subscriber toll-free payphone calls to completion.¹¹

Indeed underlying USSC's assertions and barely mentioned is an implicit rewrite of the Commissions regulations. USSC would interpret the requirement of Section 64.1310(a)(1) to read,

Each Completing Carrier shall establish a call tracking system that accurately tracks *payphone specific-coding digits when they are available on coinless access code or subscriber toll-free payphone calls* and tracks coinless access code or subscriber toll-free payphone calls to completion.

USSC's new language is set off in color, in italics and bolded. Thus although barely discussed by USSC, behind USSC'S repeated assertions that it "did everything required of it" is the notion that all a Completing Carrier has to do is buy the right kind of coding digit detection equipment. USSC acknowledges that the Completing Carrier may be liable if its system/equipment fails to read or record the coding digits when they accompany a payphone call, but not otherwise. "This is not to say that if a Completing Carrier's system is faulty and fails to recognize or record FLEX ANI, in other words is not 'accurate' for purposes of Section 64.1310(a)(1), an IXC can lawfully refuse to remit per-call compensation." Opposition 19. Thus, under USSC's reasoning, the Completing Carrier has no duty to test to make sure it is receiving the coding digits on all calls nor any duty even to inquire of its Intermediate Carrier if the Intermediate Carrier(s) has ordered the coding digits from the LEC(s) from whom traffic is received by the Intermediate Carrier(s)¹²

¹¹ 47 CFR § 64.1310(a)(1)." (Emphasis and this footnote added.)

¹² The question of what steps a carrier must take to have an accurate call tracking system is not at issue in this proceeding. Rather, all that is at issue is whether the carrier in fact must have an accurate, as opposed to an inaccurate, call tracking system in place. We cite the duty to test and coordinate as merely illustrative of steps a carrier takes in fulfilling the duty of the carrier to make sure its call tracking system is accurate. See also text following this footnote.

USSC admitted in this case that its contracts with the Intermediate Carrier, Level 3, did not require Level 3 to transmit payphone-specific coding digits to USSC, that USSC had not even inquired of Level 3 whether Level 3 had ordered payphone-specific coding digits from the LEC, that USSC had done no testing with Level 3 to verify that USSC was receiving coding digits on all payphone calls, and that it never requested that Level 3 send it payphone-specific coding digits, despite the fact that USSC's entire ability to accurately track payphone calls depended on receipt of the digits. Attached as Exhibit 1 is the page from Petitioners' brief summarizing these points along with the relevant transcript excerpts.

But the Commission's orders and regulations require the Completing Carrier system to count calls, not digits, accurately. And the Commission has stated that Completing Carriers should test and coordinate their networks with the networks of other carriers to ensure that the system is accurately counting calls.¹³

Thus, it is not whether a Completing Carrier may permissibly rely upon FLEX ANI that is at issue here, as urged by USSC, but whether a Completing Carrier must have an accurate call tracking system so that it pays on all payphone calls, accompanied by payphone-specific coding-digits or not. Petitioners contend it is the latter that is at issue. Since the Completing Carrier is the only party charged with paying PSPs the compensation to which the PSPs are entitled under the statute, those Completing Carriers must accurately track all calls.

B. The Commission Has Never Required That Payphone-Specific Coding Digits Accompany A Specific Call For The Call To Be Eligible For Compensation. Completing Carriers Must Pay For All Completed Calls Known To Have Come From Payphones Irrespective Of Whether The Call Has Payphone-Specific Digits

In contending that Completing Carriers can avoid paying DAC for calls for which they failed to receive payphone-specific coding digits, USSC makes two sub-arguments, both of which are unavailing. First, USSC twists the meaning of several Commission orders to read statements to the effect that Flex ANI digits must be "transmitted" as equating to "Flex ANI digits must be received by the Completing Carrier or the carrier has no liability. *See* Opposition, Section I(A) at 11-14. Second, USSC gives an equally distorted twist to language in Commission orders saying that carriers may opt to use FLEX ANI to track payphone calls, reading it to mean meaning that the if a carrier does so, it may pay only for calls received with FLEX ANI digits, and links this latter point to argue that requiring Completing Carriers to pay on calls without payphone-specific digits would undermine the use of FLEX ANI. *See* Opposition, Section I (B) at 14-21.

We address these arguments together in this sub-section. But it is important to recognize that USSC's arguments all draw on the same misguided premise: adoption of FLEX ANI provides a safe harbor. The arguments all fail because that underlying predicate is wrong.

¹³ *See* APCC Comments at 9-10.

Section 276 requires the FCC to “ensure fair compensation for each and every . . . completed call.” As discussed above the FCC implemented this mandate by putting the obligation to track and pay on Completing Carriers. In order for the regime not to be violative of the Act, this necessarily means that Completing Carriers, who are charged with paying the compensation, must have a system in place, as discussed above, that ensures that they do in fact pay compensation for “each and every” completed call. If the carriers do not do so, since PSPs have nowhere else to look under the regime, some compensable calls would go uncompensated. It follows necessarily then that the mere selection of any one method of tracking calls doesn’t mean that a carrier has met its responsibility under the Act and FCC rules—the responsibility is to pay compensation on every completed call. The adoption of FLEX ANI is only a means to that end, not the end itself. While Flex ANI was mandated because it is a good tool, it is only that—a tool that carriers can use to meet that obligation. But it is only as good a tool as carriers make it.

Requiring Completing Carriers to track accurately and pay on the basis of accurately tracked information, no matter what tracking system the Completing Carrier uses, is the *sine qua non* of the Commission’s compensation regime. As we now discuss, this requirement is entirely consistent with requiring Completing Carriers to pay on all calls shown to be payphone calls without regard to the particular tracking system used by the Completing Carrier.

As demonstrated in the *Petition*, e.g., at 19-20, and discussed below, the Commission adopted requirements for the LECs to make payphone-specific coding digits available in order to assist Completing Carriers in tracking payphone calls. And as discussed above and further below, nothing in any Commission pronouncement even implies that the use by a Completing Carrier of the coding digits as a tracking mechanism relieves the Completing Carrier of its duty to have an accurate call tracking system.

USSC nonetheless seizes upon language that, as explained in the *Petition* (at 17-18), first appeared in the *October 7, 1997 Bureau Waiver Order* and was subsequently carried over in various iterations into a number of Commission and Bureau orders, to argue that the “Commission has repeatedly reaffirmed that FLEX ANI . . . must be ‘transmitted’ with every

payphone call.” Opposition 11, et seq.¹⁴ Petitioners showed at length how in the context in which this language was used, it is clear that the language was not intended to allow Completing Carriers to avoid paying compensation on calls known to have come from payphones, but instead, was addressed to when the duty to transmit the coding digits was triggered. The language addressed to the issue of when the waivers granted (in for example, the *October 7, 1997 Bureau Waiver Order* and the *March 9, 1998 Coding Digits Waiver Order*) to the PSPs and the LECs from providing the digits would expire --once FLEX ANI became available at a central office. *E.g. see Petition* at 17-18, 24-27, 31-38.

Rather than address on the merits Petitioners’ arguments about how this language must be interpreted in the historical context and the posture of events at the time the Commission chose to use the language, USSC simply quotes the language again and again, observes that the Commission has repeatedly used the language, stating that the Commission refers to the requirement “more than 50 times.” Opposition 12, extracts several of those quotes, and reiterates its view of the meaning of the language with no additional supporting rationale. Opposition 11-13. But this “literal,” narrow reading of the language which, as we discuss below, characterizes much of the Court’s and USSC’s approach to the Commission’s regulatory regimen, is simply not correct and the Commission should reject it.

The Opposition goes on to argue that granting the *Petition* would in some manner undermine the incentive for carriers to rely on FLEX ANI or reduce it to legal irrelevance. USSC laments that Completing Carriers could be thrown back on having to track payphone calls by looking at the ANI lists.¹⁵ Opposition 13. USSC has completely misunderstood the purpose

¹⁴ To clarify any confusion, the Parties (and the Court of Appeals) are all in agreement that the payphone itself does *not* transmit the coding digits, but rather, that the LEC generates the coding digits as part of the ANI. The Court’s observation on this point was explicitly noted in the *Petition*, at n.57. USSC observes that the *Petition* made the same point and USSC highlights it, emphasizing that the Court did not impose on PSPs any requirement that the phone itself generate coding digits. *E.g.*, Opposition 7, 13-14. Petitioners agree, and do not contend that the Court ruled that the phone itself must transmit digits. To the extent there was confusion on this point, Petitioners agree with USSC. The Court’s ruling to which the *Petition* is addressed is that the PSP must ensure that the LEC transmits the digits and has the burden of showing that the LEC did, in fact, send the digits.

¹⁵ What U.S. South does not disclose is that when U.S. South got into this dispute with the Petitioners and decided to block calls from Petitioners’ payphones, rather than rely on its

of the Commission's requiring the LECs to implement FLEX ANI and its purpose in the compensation structure. As pointed out in the *Petition*, at 14 (citing *September 20, 1996 First Report and Order* at 20575 ¶ 66), the Commission required payphone-specific coding digits to "assist carriers in identifying dial around calls." There is nothing in any statement ever made by the Commission that implies that a carrier's use of FLEX ANI has any more "relevance," see *Opposition i*, 17-19, than a carrier's use of any other tool.¹⁶

USSC contends that Petitioners would render carriers' use of FLEX ANI "irrelevant," e.g., *Opposition 17*, and that carriers will have no incentive to order FLEX ANI unless it insulates them from liability. *Opposition 20*. Relying on its contention that the *Petition* would render FLEX ANI less relevant or even irrelevant, USSC laments the "costly and long process of converting local exchange carrier ('LEC') central offices to FLEX ANI compatibility." *Opposition 4* (see also discussion at *Opposition 20*). USSC fails to note that it is the PSPs who paid for that conversion.¹⁷ And because the system has been paid for, not only is there no concern with stranded investment, *Opposition 17*, the Commission has required it to be free to carriers and it can be a useful tool for implementing an accurate tracking system, either alone or in conjunction with other tools the Commission allows carriers to use to implement an accurate call tracking system. It would indeed be an irony if the system the Commission required the PSPs to pay for in order to collect dial-around compensation now became a barrier, not a facilitator, to the collection of compensation.

The parties agree that a carrier is free to use the technology and system of its choice to track payphone calls. *Petition 13*, *Opposition n. 15*, 15. But whatever the system or technology

deficient FLEX ANI based call tracking system on which it relied for payment purposes, USSC did indeed rely on real-time look-up of ANIs in order to block the calls. Thus, USSC was content to rely upon its supposedly "accurate" call tracking system to track the calls for payment purposes, but did not apparently regard the system as sufficiently accurate for blocking calls from Petitioners' payphones.

¹⁶ The Commission of course could not guarantee that FLEX ANI would work; that is why the obligation on the carriers to accurately track payphone calls is so critical to ensuring payment on all completed calls. See APCC Comments at 10, 13, explaining that imposing the tracking responsibility on the Completing Carrier ensured that the Completing Carrier would take steps to ensure that the necessary information to track the calls made its way through the call path. See discussion in Section II, *infra*.

¹⁷ See *Coding Digits Waiver Order*, 13 FCC Rcd 5019, ¶35.

used by the carrier, the result must be an accurate count and the Completing Carrier must pay on all completed calls, irrespective of whether the calls have the correct coding digits. The fact that a carrier may have used a technology and a system involving LIDB look up, or LEC lists, is of no consequence; if the result was an inaccurate count, requiring the carrier to pay for the uncompensated calls does not render LIDB or LEC lists “irrelevant.” It merely says that the carrier must have an accurate system and cannot escape liability; a carrier using the same system or technology would have no liability if the call count is accurate, and it is the accuracy of the count that is at issue.

In short, FLEX ANI would remain an important available tool for carriers to use as part of an accurate payphone call tracking system. Petitioners recognize that many Completing Carriers effectively use it as a tool to accurately track and pay for millions of payphone calls. But that does not make it into a talisman, and does not mean that all a Completing Carrier has to do is adopt FLEX ANI as its tracking system in order to have complied with the Commission’s rules. A Completing Carrier still has responsibility for the accuracy of its tracking system.

On the other hand, USSC’s position is that reliance on FLEX ANI is a safe harbor; if a Completing Carrier relies on FLEX ANI as part of its call tracking system, it is immune from liability for failing to pay for completed payphone calls, even though its system failed to accurately count the calls. There is no statement anywhere that even implies that the Commission ever intended to create such a barrier to carrier liability by adopting the FLEX ANI requirement. Moreover, by relieving the Completing Carrier from its duty to pay for the calls, such a ruling would plainly be inconsistent with the Commission mandate that the PSP must be compensated for all completed call. The use of FLEX ANI has no more legal significance than the use of any other system and cannot provide any more relief from the responsibility to pay than any other tracking system. Certainly, one will search in vain for anything saying the use by a Completing Carrier of FLEX ANI creates a safe harbor.

USSC makes much of various snippets of Commission language to argue for a special status for Completing Carriers relying on FLEX ANI. For example, USSC cites the Commission’s *September 30 2003 Revision Order* stating that the Commission has “emphasized” that a tracking system does not need to be perfect and that an SBR “must pay a

PSP directly based on the SBR's own call tracking data.” Opposition 15. From these statements, USSC concludes that a Completing Carrier that relies on the FLEX ANI information that its call tracking system has collected is operating within the confines of the Commission's rules. And similarly, because the Commission has allowed Completing Carriers “to rely upon the presence or absence of payphone ‘coding digits’ in discharging their compensation obligations,” a Completing Carrier who does so is in compliance with the Commission's rules. Opposition 15-16.

The Commission's “emphasis” to which USSC refers is a single footnote.¹⁸ The Commission never said the system does not have to be “perfect” or to pay on all completed calls. Contrary to the implication in the Opposition, in the footnote, the Commission instructed system auditors that a system need not have a “100% compliance rate” on each of 12 enumerated criteria set forth in the order for overall compliance with the Commission's rules but directed that the auditor should ensure “that the tracking system is accurate and reasonably capable of accounting for and resolving discrepancies between PSP and SBR data.” Moreover, USSC ignores other requirements that have a slightly different “emphasis.” Section 64.1310(a)(3) of the Commission's rules, 47 CFR §64.1310(a)(3), requires the Chief Financial Officer of a Completing Carrier to submit with its quarterly payment reports to a PSP “a sworn statement that the payment amount for that quarter is *accurate* and is *based on 100% of all completed calls* that originated from that payphone service provider's payphones.” (Emphasis added.)¹⁹ There is no compromise of the “accuracy” of the tracking system.²⁰

Thus, USSC again ignores the fundamental predicate underlying the Commission's statements—that the Completing Carrier has in place a system that *accurately* tracks and collects the information for all calls to be paid, irrespective of coding digits. Based on its faulty premises

¹⁸ *September 30, 2003 Revision Order*, 18 FCC Rcd19994, n.109, ¶40.

¹⁹ We point out below, that USSC has not filed a Chief Financial Officer certification in almost 4 years. *See* note 30, *infra*.

²⁰ The less than perfect but “accurate” system to which USSC refers turns out in USSC's case to have failed to count approximately 16,000 completed calls not having payphone-specific coding digits out of 47,000 calls total, an error rate of 34%. USSC's contention that the Commission's statement reasonably interpreting Section 276 not to require perfection and to perhaps authorize an occasional error cannot relieve the Commission (and under the Commission's regulations, Completing Carriers) from the obligation to ensure PSPs are compensated “for each and every . . . completed call.”

(and factual errors, as discussed in the next paragraph), USSC comes to a faulty conclusion: “That since call tracking data is allowed to consist of FLEX ANI information supplied with the calls, the necessary conclusion is that” Completing Carriers must pay compensation only on calls “that FLEX ANI information shows were completed from payphones.” Opposition 15. Not only is the predicate that the tracking system must be accurate again ignored, but USSC’s conclusion simply does not follow from its premise: if calls are proven to have come from a payphone and acknowledged by the Completing Carrier to have come from a payphone, as is the case here, the Completing Carrier cannot rely on the absence of coding digits and language in Commission orders that occurred in a different context to argue that it should not have to pay compensation. That would put the Commission’s regulations at odds with the statute’s requirement that PSPs be “compensated for each and every . . . completed call.”²¹

Apart however from the mischaracterization of Commission language and the nature of the call tracking requirements imposed upon Completing Carriers, USSC also makes factual errors. For example, USSC states that FLEX ANI “was mandated in order to provide the precise per-call information *necessary* for Completing Carriers to reliably track payphone calls,” Opposition 15 (emphasis added), and that the “Commission imposed *mandatory* call-identifying technology on the *telecommunications industry*.”²² Opposition 16 (emphasis added). But the information was neither “necessary” nor “mandatory on the telecommunications industry” to identify payphone calls. The history of how the Commission came to require FLEX ANI to be available was traced in the *Petition*. The requirement for Completing Carriers to accurately track calls was first imposed in the *September 20, 1996 First Report and Order*.²³ At that time, which

²¹ We note also that although not directly questioned on the record of the proceeding, the Commission can take official notice of the fact that USSC has not in fact filed audits or CFO certifications for about 4 years. See note 30, *infra*.

²² USSC also reiterates its reliance on the literal, as opposed to the historical-contextual, interpretation of the Commission’s and the Bureau’s language referring to payphone-specific coding digits as a “prerequisite” for payphone compensation. Opposition 16-17

²³ 11 FCC Rcd 20590-92, ¶¶96-101. See also *id.* at 20567-68, ¶51. At the time, the tracking obligation was imposed upon IXCs because the Commission initially charged the IXCs with tracking and paying compensation for payphone calls. The responsibility for tracking accurately has remained with the carrier obligated to pay through all the various iterations of the Commission’s rules, although the nomenclature of Completing Carrier was not adopted until the Commission’s *September 30, 2003 Revision Order*. *Petition*, n.5. We use the Completing Carrier nomenclature here for simplicity.

was prior to the implementation of FLEX ANI and contrary to USSC's assumption to the contrary, the Commission concluded that carriers already had the capability to track payphone calls.²⁴ Thus, FLEX ANI was not "necessary" to allow carriers to track payphone calls. Although the Commission deferred the requirement that Completing Carriers pay per call compensation for a year (until October, 1997), it gave the Completing Carriers complete flexibility in implementing tracking capabilities, including allowing each Completing Carriers to use the technology of its choice and even the ability to contract out the tracking responsibilities. Thus, as the Commission acknowledged, and indeed as USSC itself acknowledges, Opposition, e.g., 15 ("While a Completing Carrier is not required to rely on FLEX ANI . . .), the information was neither "necessary" nor "mandatory on the telecommunications industry" to identify payphone calls or the Commission would not have given carriers the choice to use it or not and carriers would not in fact be using other tracking systems. When a number of LECs were not ready to offer payphone-specific coding digits in October, 1997, prior to the implementation of FLEX ANI, the Bureau issued the *October 7, 1997 Bureau Waiver Order* granting a waiver to the LECs of the deadline for the LECs to provide payphone-specific coding digits but significantly, there was *no waiver* to Completing Carriers *from the requirement to pay per call compensation* and the Completing Carriers were required to pay per call compensation even without payphone-specific coding digits. In the *March 9, 1998 Coding Digits Waiver Order* -- six months *after* the per call obligation went into effect--the Bureau again granted waivers to the LECs of the deadline for implementing payphone-specific coding digits and waivers to PSPs where FLEX ANI had not been implemented until FLEX ANI was implemented, but again, there was no waiver of the obligation of carriers to pay per call compensation.

In fact, carriers were able to track payphone calls prior to FLEX ANI. The FLEX ANI system was imposed to assist Completing Carriers in tracking payphone calls,²⁵ and while there is some basis to assert that it is an industry standard, Opposition 21, it is also true that many carriers rely on other systems or back up their reliance on coding-digits with other systems in

²⁴ "Based on the information in the record, we conclude that the requisite technology exists for IXC's to track calls from payphones." *September 30, 1996 First Report and Order*, 11 FCC Rcd 20590, ¶90.

²⁵ See, e.g., *November 8, 1996 First Payphone Reconsideration Order*, 11 FCC Rcd 21265-66, ¶64.

order to ensure the accuracy of the systems, as USSC did when it wanted to block calls from Petitioners' payphones.

II. UNDER THE COMMISSION'S COMPENSATION SYSTEM, COMPLETING CARRIERS, APPROPRIATELY, ARE RESPONSIBLE FOR ENSURING THAT THEY GET ACCURATE PAYPHONE CALL TRACKING INFORMATION AND PAY ON ALL CALLS

A central premise of the Opposition is that holding Completing Carriers responsible for the accuracy of the information they receive and on which they base their compensation decisions is somehow unfair and would undermine the Commission's dial-around compensation regime. USSC argues that this is particularly so with regard to requiring payment irrespective of whether the Completing Carrier receives payphone-specific digits. It decries such a system of "strict liability" as harsh and asserts that "fairness"²⁶ and "equity" to Completing Carriers dictate that they not be responsible for ensuring the flow of the coding digits through the network. Opposition, 18. USSC proposes to relieve Completing Carriers of the responsibility by having the Commission rule that when, as is the case here, the Completing Carrier has not received the coding digits and admittedly undercounted the calls from payphones and has not paid for completed calls that the Parties agree came from payphones, --in other words, the Completing Carrier did not accurately count the calls-- the Completing Carrier should not have to pay for the calls because there was a failure somewhere in the system on which the Completing Carrier chose to rely and into which only that Completing Carrier has full visibility. Thus, USSC would not only change the Commission's rules to require that a Completing Carrier only "tracks *payphone specific-coding digits when they are available on*" dial around calls, see discussion on

²⁶ The Opposition quotes the Commission language regarding the need for fairness to all. Opposition 18 (citing *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration, 17 FCC Rcd 21274, 21302-03 ¶82 (2002).) While Petitioners certainly agree that there needs to be fairness for all, the compensation provisions need also to be interpreted in light of their primary purpose, which the Court of Appeals in this very case found to be to ensure fair compensation to PSPs. See note 7, *supra*. Petitioners also note that in using the fairness language, the Commission was referring to the fact that the statute mandates that the Commission was obliged to set "fair" compensation for PSPs, and to be fair, the level of compensation had to be fair to all parties. The Commission was engaged in setting the rate of compensation, not implementing its mandate to ensure that PSPs are compensated on "each and every . . . call" as opposed to depriving PSPs of compensation entirely on some calls, thus undermining the primary purpose of the compensation provisions --to ensure that PSPs do receive compensation.

page 7, *supra*, but would also absolve a Completing Carrier from any responsibility to ensure that in fact it is receiving the digits on which its system depends to count and compensate payphone calls. Under USSC's reasoning, a Completing Carrier could have an "accurate" system for counting digits, but not order FLEX ANI and still be in compliance with the Commission's rules.²⁷

Again, the Commission rules provide for the Completing Carrier to be responsible for paying DAC, and the Completing Carrier cannot be relieved of that responsibility in the absence of its being put on another party. If the Commission's regime allowed Completing Carriers to escape payment for a category of calls, the statutory mandate of compensation on all completed calls would be violated.

But in any event it is not unfair, indeed it is eminently fair, to declare that as the "primary economic beneficiary" of dial-around calling from payphones,²⁸ the Completing Carrier electing to use a particular system take responsibility for ensuring the good working order of that system. Indeed, that is the only way the system could work. As explained by APCC,²⁹ the Completing Carrier is the only one in the call path who knows what information is being received at the end of the path and in a position to make sure that each carrier in the call path is doing its job. A Completing Carrier relying on coding digits is the only one who can insist that the Intermediate Carrier has ordered FLEX ANI from the LEC, is the only one who can test as necessary to ensure that the coding digits are being consistently carried across the interfaces between the Intermediate Carrier and the Completing Carrier, or do whatever is required to ensure that calls are accurately tracked.

Moreover the use of labels, such as "strict liability" confuses the issues in another way. It implies that a Completing Carrier who fails to accurately track calls and is required to pay for its untracked payphone calls will necessarily bear the financial burden of paying for calls that are not properly tracked even if the carrier has taken all the steps necessary to properly implement

²⁷ See also the discussion in the text following note 20, *supra*, where USSC asserts that a Completing Carrier need only pay DAC on calls where the Completing Carrier's system records coding digits.

²⁸ E.g., *September 20, 1996 First Report and Order*, 11 FCC Rcd 20584, ¶83.

²⁹ APCC Comments at 10, 13. See also *Petition* at 29-31.

the tracking system. As explained in the APCC Comments, at 10, 13, a Completing Carrier who has in fact properly implemented a FLEX ANI based system and, to use the phrase used by USSC, done “everything right,”³⁰ would probably have recourse against its serving LEC or Intermediate Carrier (as the case may be).³¹

Indeed, by repeatedly asserting that a Completing Carrier who has done everything required of it should not be responsible for the ultimate tracking and payment for calls for which it did not receive coding digits, USSC makes clear that it also believes that any payment by the Completing Carrier for such calls will be recovered from another carrier in the call path. The direct relationship between the Completing Carrier and the Intermediate Carrier or the LEC, as discussed above, would facilitate a direct remedy.³²

³⁰ To be clear, none of this is to say that Petitioners agree that USSC did “everything required” of a Completing Carrier. This assertion is simply belied by the facts. USSC was negligent in its failure to take the steps necessary to ensure that its system was counting calls accurately. *See, e.g.,* note 12, *supra*.. Indeed so lacking in confidence was USSC in the integrity of its tracking system that it has not filed a CFO certification with its quarterly payments, as required by Commission rules (47 CFR §64.1310), since 2007. And with good reason: despite its repeated assertions regarding the accuracy of its tracking system, USSC failed to file a system audit report, as required by the Commission rules (47 CFR §64.1310) for each of the years since 2006. See Exhibit 2, a screen shot from the web site of USSC’s aggregator clearinghouse. (Last visited October 12, 2011.)

In support of its contention that it did nothing “wrong,” USSC notes that the complaint in the District Court failed to allege any violations of any regulations. Opposition at n.5. *See also id.* 20. But as USSC itself notes, violations of Commission regulations are not the basis of District Court actions under 47 USC §206. *E.g., id.* n.7. The violation that formed the basis of the litigation was the failure to pay the dial-around compensation, and that violation was clearly alleged.

³¹ The Commission has given Completing Carriers great discretion in how they arrange for accurate tracking. For example, the Commission has long recognized that a carrier who is liable to pay compensation and who has difficulty tracking calls can contract with another carrier to perform the tracking function. *September 20, 1996 First Payphone Order*, 11 FCC Rcd at 20590 ¶ 97. Such contracts can also provide for indemnification in the event that one carrier fails to perform its assigned tracking functions, such as the ordering or transmission of coding digits. PSPs have no obligation, or means, to regulate the relationship between Completing Carriers and the carriers who bring traffic to them.

³² USSC acknowledges in several places that it does have in mind a “fault-based” system, where the party in the call path who in some way defaulted in performing its function would be the one responsible for absorbing the lost DAC. For example, omitted from the lengthy quote from the Court’s opinion summarizing the position of the Parties, Opposition at 3, is the Court’s summary of USSC’s position: “U.S. South argues that if it did not receive FLEX ANI digits, the

By contrast, it is certainly not sensible or any part of the Commission's regime to impose on PSPs the responsibility for being able to track the flow of digits through the network and to be able to ascertain where the failure lies and to pursue the entity responsible for the failure. While USSC acknowledges that there are some limitations on the visibility of PSPs into the network and their ability to monitor whether the coding digits are flowing properly, Opposition 18-19, it also claims that PSPs have tools available to them that will raise flags as to "system deficiency." *Id.* 14. But APCC has addressed at length why the information available to PSPs, and which is available only several months after the fact, may give them some insight into a problem (that existed and may or may not still exist) somewhere in the network, that information gives the PSPs little or no insight into whether the problem is at the beginning, middle, or end of the call path.³³ In addition, the PSPs receive no direct information about coding digits.³⁴ And indeed, PSPs don't even have the information to begin to inquire about the problems affecting a particular Completing Carrier since in many cases, and particularly with SBRs such as USSC, they do not even know what kind of tracking system the Completing Carrier uses.

[FCC] regulations require compensation *only if it can be found that the completing carrier or IXC is at fault.*" Slip Op at 5585(emphasis added). In the Opposition, at 8, USSC adds to the list of entities who may be at fault the LEC, the Intermediate Carrier, and the PSP. It states that only the party who is shown to have done something "wrong" among the parties in the call path should be liable for the DAC. A PSP will have little to add to this showing, since it has no information about what went wrong once the PSP has ordered a payphone line. *See* text following this note and Section IV, below. Since it is only the carriers who can say what happened to the call and what went "wrong" once the call entered the network, as explained in the text and in the APCC Comments, at 10, 13, holding the Completing Carrier responsible for having a call tracking system is clearly what the Commission intended in order to ensure that each carrier in the call path meets its responsibilities and that PSPs are compensated for "each and every completed . . . call." 47 USC § 276.

³³ Where a carrier does make tools available for a PSP to have visibility into the network, the PSP may also use those tools. For example, some carriers make toll free numbers available to PSPs that when dialed will tell the PSP whether the carrier's platform is receiving payphone-specific coding digits. As explained in the *Petition*, at Note 45, while not without their limitations, these test lines are very useful. USSC cites these test lines as one of the reasons Completing Carriers should not be required to pay on calls lacking payphone-specific digits. Opposition 14. USSC neglects to mention that U.S. South did not and does not make available such a test line so no PSP could have used such a tool to know either that its phone lines were not transmitting digits to USSC or that USSC was not receiving the digits.

³⁴ APCC Comments at 6-9.

Moreover, if the Commission had intended for the PSP to have the same rights against the Intermediate Carrier or the LEC as the Commission intended for the PSP to have against the Completing Carrier, presumably the Commission would have provided for a direct remedy by the PSP. The Commission would have declared an Intermediate Carrier or a LEC responsible for payment of the DAC if one of them failed in its responsibilities under the regulatory regime, declared it to be an unfair and unreasonable practice under 47 USC § 201 for those carriers to meet their respective responsibility under the Commission's rules and orders, and thus given a PSP the same remedies and rights against an Intermediate Carrier or even a LEC as a PSP has under 47 USC § 206 against a Completing Carrier. But the Commission did not follow that course. Instead, it made it an unjust and unreasonable practice for a Completing Carrier who owes compensation under the rules to refuse to pay compensation. *September 30, 2003 Revision Order*, 18 FCC Rcd 19990, ¶ 32. Thus, "strict liability" for the Completing Carrier is consistent with the regime adopted by the Commission since the Completing Carrier would have recourse against the other carrier(s) in the call stream who caused the damages.

Citing no source or Commission statement, and relying only on its own authority, USSC goes on to claim the Commission took account of the information imbalance when it placed the responsibility for transmitting FLEX ANI on LECs, and the responsibility for accurate call tracking on Completing Carriers. But now, USSC proposes to undermine its own self-proclaimed balancing by undermining both of those supposed factors. USSC would affirm the Court's ruling that PSPs must demonstrate that the LEC sent the digits into the network even though the Commission assigned responsibility for transmitting the digits to the LEC. We address that point below. But in any event, it is unclear what alleged "imbalance" USSC believes the Commission was addressing. The requirement that the LECs implement FLEX ANI was a piece of the puzzle for implementing the statute, not some balancing of interests. By imposing FLEX ANI responsibilities on LECs, the Commission was not relieving Completing Carriers of their responsibility for accurately tracking and paying for payphone calls; the Commission was facilitating it, not creating a defense for the Completing Carriers.

Finally, although as noted the specifics of the dispute between Petitioners and USSC are not immediately relevant to the resolution of the declaratory ruling sought by Petitioners, one of USSC's claims precisely illustrates the difficulty PSPs have in getting visibility into the network.

USSC asserts that Petitioners failed “to test their lines with Petitioners’ serving LECs.” Opposition 20.³⁵ USSC does not address how Petitioners could have done so. There is no rule or regulation requiring the LEC to engage in such testing. As APCC explained, it is difficult to get the LECs to engage on FLEX ANI issues because there is no revenue for them and PSPs don’t have a choice to go to another LEC.³⁶ Nevertheless, USSC would now deprive PSPs of a remedy against the Completing Carriers who have both the responsibility and the ability to ensure that the coding digits are being delivered.

III. THE SIGNIFICANCE OF A REMEDY AGAINST THE LECs IF THERE IS A FAILURE BY THE LEC TO TRANSMIT PROPER CODING DIGITS

In a strange twist of logic, USSC asserts that since PSPs have a remedy against the LEC if the LEC fails to transmit payphone-specific coding digits into the system, that is sufficient to ensure that the PSP receives proper compensation and the Commission therefore need not concern itself with whether the Completing Carrier has failed to track calls accurately and is paying on all calls. Opposition 20-21. There are multiple flaws with this assertion. To start with, as APCC set forth at some length, the PSP simply doesn’t know when the LEC has failed to transmit the correct coding digits, and in all APCC’s extensive experience, the LECs don’t disclose their failure to transmit coding digits even when asked.³⁷ Thus, for USSC to assert that an adequate remedy exists, when there is virtually no way for the PSP to know or even suspect that the facts support the asserted remedy, is simply silly.

Equally important, and again as set forth by APCC,³⁸ based on any rational analysis the PSP can conduct based on the information and tools available to it under the Commission’s rules, the PSP won’t be able to tell whether the problem is that the LEC has failed to transmit the coding digits; what the PSP will be able to see is that one or more Completing Carriers is paying

³⁵ By addressing only this one USSC allegation of several contained in the same paragraph of the Opposition on page 20, Petitioners do not concede the accuracy of the other misstatements but addressing them is not immediately pertinent to disposition of the *Petition*. Some of the statements are so totally irrelevant as not to warrant response under any circumstance. For example, USSC seems to fault Petitioners for not bringing a complaint at the Commission instead of choosing to pursue their legal rights in Court, as permitted by the Communications Act, 47 USC §§206-207.

³⁶ APCC Comments at 7.

³⁷ APCC Comments at 6-7, 11-13.

³⁸ *Id.* 7-9. *See -also id.* 11-13.

for a disproportionately low number of calls as compared to the number of calls the Completing Carrier is receiving from its Intermediate Carrier(s). Whatever the remedy against the LEC in the highly hypothetical case where the LEC has failed to deliver the correct coding digits and there is a reason for the PSP to know or suspect it, the issue is not when the LEC has failed to transmit coding digits; the issue is when the coding digits have disappeared somewhere in the call path and the Completing Carrier has not received them, as the case giving rise to this proceeding reveals.

As USSC acknowledges, *e.g.*, Opposition 9, and as explained in the *Petition*, *e.g.*, 9, 12, there are frequently multiple carriers in the call path before the call gets to the Completing Carrier, and indeed, that was the pattern in this case. The calls in this case went from the serving LEC, to Level 3, to USSC. The question of whether the LEC sent the coding digits into the call stream only answers at most half the question of whether the digits got to USSC; the other half of the question deals with the relation between Level 3 and USSC.

Again, the history of this proceeding is instructive. With respect to the first question, the Petitioners introduced substantial evidence that in fact, the LEC did transmit the coding digits. This evidence is summarized in the Petitioners' brief in the Court of Appeals.³⁹ Rather than reciting the evidence here, we have attached as Exhibit 3 the relevant pages from the brief.⁴⁰

Assuming this evidence was adequate to show that the LEC did transmit the payphone-specific coding digits to carriers who ordered the FLEX ANI service, it would lead to an inquiry under the second question; What about the relation between the LEC and Level 3 and the relation between Level 3 and USSC? These latter questions in turn lead to a number of subsidiary questions. Did Level 3 order the FLEX ANI service from the LEC?⁴¹ If the LEC did

³⁹ The Court of Appeals did not address the substantiality of Petitioners' evidence because the District Court made no finding on the evidence, instead simply ruling that the Completing Carrier was liable for the calls admittedly having come from Petitioners' payphones regardless of the presence of the payphone-specific digits.

⁴⁰ To be clear, we offer these materials not to prove Petitioners' case here but to illustrate the inadequacy for PSPs of a remedy against non-performing LECS where it is the Completing Carrier's tracking and/or payment that is at issue and why a remedy against a non-performing LEC is not sufficient to execute the Commission's responsibilities under Section 276.

⁴¹ USSC states that PSPs have a remedy against LECs who do not provide the proper coding digits "to IXC's that have ordered and permissibly rely on those payphone identifiers."

transmit the digits into the network with the call stream, was Level 3's interface to the LEC network properly configured to receive the digits? Did Level 3 in turn transmit the digits to USSC? Were there any issues between the interconnection interfaces of Level 3 and USSC that prevented the digits from getting to USSC even if Level 3 did receive and pass on the digits? If so, can it be said whether the problem was on the Level 3 side or the USSC side, or both? The evidence submitted by the Petitioners indicated that the answer to the first two subsidiary questions is yes, but the remaining questions remain unanswered, and no evidence was submitted on them.⁴²

As the very case which led to this proceeding demonstrates, it is not enough to have a remedy against a non-performing LEC, since it will often be the case that the evidence demonstrates that the LEC did in fact send the digits. As APCC has discussed, the situation in the case leading to this proceeding is typical of the situation based on what the PSP can see from looking at the available data.⁴³ It is the Completing Carrier who must be and is held accountable for having an accurate tracking system and paying for the calls under the Commission's rules. Having a remedy against the LEC when it is the Completing Carrier who fails to accurately track calls and pay for them does not advance the ability of PSPs to collect the dial around compensation to which the statute entitles them.⁴⁴

Opposition 22. The adequacy of such a remedy in general is discussed in the APCC Comments at 6-9 and is Section III below. Here, we note again that USSC never even inquired of Level 3 whether Level 3 had ordered the payphone identifiers, but that does not stop USSC from brazenly asserting it should be permitted to "permissibly rely" on the presence or absence of coding digits.

⁴² As noted above, *see* note 12, *supra*, USSC never even made inquiry of Level 3 or addressed the issue of payphone-specific coding digits with Level 3. One would assume that if USSC were not receiving coding digits from Level 3, and having made arrangements to get the coding digits from Level 3 in accordance with its responsibilities to ensure it is accurately tracking payphone calls, USSC would have immediately made that fact known and/or joined Level 3 in the litigation as a cross defendant. Indeed, joining Level 3 would have been consistent with USSC's theory that the non-performing party in the call path should be responsible for the paying the compensation. *See* discussion in note 32, *supra*, and accompanying text. The fact that USSC did not do so speaks volumes regarding its repeated claim that it took all the steps necessary to fulfill its responsibilities as a Completing Carrier.

⁴³ APCC Comments at 11-15.

⁴⁴ Moreover, as APCC has pointed out, any action against a LEC for failure to deliver FLEX ANI coding digits would presumably have to be brought at the Commission. APCC Comments

In sum, whether there is an effective remedy against a LEC failing to transmit coding digits is not the right inquiry to resolve the *Petition*. It is a red herring raised by USSC to avoid the issues raised by the *Petition*. The correct inquiry is whether holding PSPs responsible for ensuring that the LEC transmit the digits is what the Commission intended to require or whether the Commission instead recognized that PSPs could do nothing more than make sure they subscribe to payphone lines.

IV. THE PSP IS RESPONSIBLE ONLY FOR ORDERING A PAYPHONE LINE, AND NOT FOR ENSURING THAT THE LEC TRANSMITS THE PROPER CODING DIGITS

In the *Petition*, Petitioners explained that because PSPs have no control over and no visibility into what is transpiring in the networks of any of the carriers from whom they buy services, the only extent to which a PSP has any control at all is to order the appropriate payphone line services from the LEC. By contrast, the Court of Appeals in the underlying case assigned to the PSPs responsibility for ensuring that the LECs transmit the payphone coding digits. The Court stated that it had before it “the . . . task of construing the language of the FCC orders.”⁴⁵ On the basis of its “literal”⁴⁶ and out of context reading of that language, the Court ruled that “GCB, through its LEC, must assure that that the FLEX ANI is transmitted into the system.”⁴⁷

at Note 36. In addition, it would not satisfy the Commission’s obligations under Section 276. While a complaint may indeed result in a damages award under Section 416(c) because the carrier failed to meet its duties under a Commission order, the Commission cannot meet its responsibility to ensure compensation by allowing a complaint for damages against a carrier. The Commission must create the obligation to pay, and that obligation rests with the Completing Carrier.

⁴⁵ See *GCB*, Slip Op at 5589.

⁴⁶ See *GCB*, Slip Op. at 5591-92 (“A natural reading of the words in question leads to the conclusion . . . As dictionary definitions show . . .”) (footnotes omitted). USSC criticizes Petitioners for stating “falsely” that the Court relied on language in “only a single *Payphone Order* in isolation” since the Court cited several FCC orders. Opposition at 3, n.4. It is accurate that the Court referred to several FCC orders, but Petitioners point was that the language, which Petitioners acknowledged was picked up in a number of FCC orders, needed analysis in the context in which they occurred, and not in isolation from their historical context.

⁴⁷ *Id.* 5595.

The *Petition* spoke broadly of the burden the Court has imposed upon PSPs.⁴⁸ The specific relief requested by the *Petition* and the specific question posed by the *Petition* asked the Commission to clarify that the responsibility of a PSP is to order a payphone line as required by the *Payphone Orders*⁴⁹ and the PSP has no responsibility for the transmission or receipt of coding digits by carriers in the call path, which would include relief from the specific burden imposed by the Court, *i.e.*, ensuring that the digits are transmitted by the LEC.

The Court's interpretation that "GCB, through its LEC, must assure that that the FLEX ANI is transmitted into the system" is inconsistent with not only the Commission's orders but is inconsistent as well with the Court's own mode of analysis in other parts of the decision. As mentioned, in coming to this conclusion, the Court took a highly literal, narrow "natural" reading of "transmit" and "provide" as used in the Commission's orders. But the Court took a different approach when discussing the Commission's language stating that "LECs transmit the payphone-specific coding digits to PSPs, and that PSPs transmit those digits from their payphones." Here the Court decided that although the LECs don't transmit the digits to the payphones which in turn transmit the digits into the network to the IXC,⁵⁰ which would be the literal "natural" reading of the Commission's words, the Court would ignore the literal language because it "makes no real difference" what the route was by which the digits got to the IXC. The Court assumed the FCC understood the industry and its practices when the Commission used the language⁵¹ which, if taken "naturally," would lead to a different result than the result reached by the Court. But just as the need to take account of the context in which language is used and the Commission's understanding of the industry and practices must be considered when interpreting the language requiring that payphone-specific coding digits to be "transmitted by the payphone"

⁴⁸ USSC objected to the breadth of the characterization in the *Petition* of the burden imposed by the Court. Opposition 3 (the issue "is not whether PSPs alone are required to 'ensure' that Flex-ANI codes are transmitted . . ."), n.16 (referring to Petitioners' characterization as "nonsense"). To address any concern that Petitioners may have stated the Court's holding too broadly, in these reply comments, Petitioners limit themselves to a discussion of the specific duty imposed upon PSPs in the Court's order and the relief referred to in the question as posed to the Commission by the District Court.

⁴⁹ See *March 9, 1998 Coding Digits Waiver Order*, 13 FCC Rcd 5016-18, ¶¶ 32-33.

⁵⁰ As noted above, all Parties and the Court are in agreement that the payphone itself does not transmit the digits. See note 14, *supra*. Rather it is the LEC that does so.

⁵¹ *Id* 5592.

in order for a call to be compensable, the Court should have adopted that approach when interpreting the Commission's requirement for PSPs to "provide" coding digits. That context dictates that the Commission did not require PSPs to ensure the transmission of the coding digits since the PSPs have no ability either to ascertain whether the digits are being transmitted or to control the network to ensure that they are transmitted. These issues were discussed extensively in the *Petition*⁵² and have also been addressed above.⁵³

There is little direct discussion in the Opposition of the PSP's duty to ensure that the LEC transmits the digits. The major discussion is passing references to how the PSPs have understated their ability to see into the network. E.g., Opposition 14, 18, 21.⁵⁴ We have addressed this issue above, Section II, and APCC as well has discussed the inadequacy of available data, including FLEX ANI data, to give PSPs continuing visibility into the network.⁵⁵ Indeed, USSC does not argue the point that PSPs have any duty beyond ordering payphone lines. Its explicit discussion of the issue implicitly assumes that PSPs are correct that ordering a payphone line is sufficient and all that is required to trigger the LEC obligation to transmit the digits. E.g., Opposition at 10.⁵⁶ USSC implicitly recognizes that any discussion of the mechanics of how the PSP is supposed to ensure that the LEC transmits the digits will make obvious what USSC knows, just as the Commission knows, that the PSP has no ability to police the LEC's issuance of the digits. Moreover, there are enormous practical problems with being able to get a LEC to devote the resources to engage in the testing to determine where

⁵² See, e.g., 28-31.

⁵³ Nor is there any doubt but that the interpretation adopted by the Court is not binding on the Commission since the Commission has plenary authority to interpret its own regulations. See *Petition*, note 7.

⁵⁴ Indeed USSC acknowledges that PSPs have no control over the networks and do not have the ability to control whether FLEX ANI digits are transmitted., Opposition 18, 21.

⁵⁵ APCC Comments at 6-9.

⁵⁶ On just page 10 of the Opposition, USSC states in two different ways that a PSP's obligation does not extend beyond the duty to order a payphone line. USSC first states that "Petitioners may be correct that their own regulatory obligation is satisfied by ordering a payphone line, which in turn triggers a LEC's obligation to provide payphone specific Flex-ANI with each call." but that does not address whether an IXC has met its obligation to have an accurate call tracking system. USSC also states that a "PSP's line-ordering responsibility "must be addressed with the responsibility of the IXC.

breakdowns in FLEX ANI are occurring, as mentioned above. *See* text accompanying note 33, *supra*.

Not only are there the practical problems. As the *Petition* pointed out, the Commission has been clear that the sole responsibility of PSPs is to order payphone lines and that PSPs have no responsibility for ensuring the transmission of coding digits –either from the LEC or at any other point in the call path.⁵⁷ As discussed above, it is the Completing Carrier who must ensure the integrity of the call-tracking system that carrier has chosen to use. PSPs are unaware of the tracking system used by most Completing Carriers, particularly SBRs. Just as it would make no sense to allow a Completing Carrier not relying upon coding digits to avoid liability for payphone calls because the coding digits did not accompany payphone calls, *see* discussion at __, *supra*, it would be equally inane to require a PSP to ensure that the LEC sent coding digits to a Completing Carrier who does not base its tracking system on coding digits. The bottom line inquiry must always be whether the Completing Carrier took the steps necessary to make sure its call tracking system is accurate, *i.e.*, counts all completed calls, and is paying on all completed calls

CONCLUSION

For the foregoing reasons, the Commission should grant the *Petition*, and declare that if a PSP has ordered a payphone line from the serving LEC, the completing carrier is obligated to pay the PSP per-call compensation for completed coinless calls made from that payphone line,

[Remainder of page intentionally left blank]

⁵⁷ *Petition* 28-30.

and the PSP has no responsibility for the transmission and receipt of payphone specific coding digits by the carriers in the call path.

Respectfully submitted,

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October 17, 2011

EXHIBIT 1

Flex-ANI as its mechanism, then, yes, they have a duty to ensure on an ongoing basis that it's functioning properly.

(Tr.83:19-84:1) (emphasis added). Thus, USS had an ongoing obligation to test and coordinate with L3 to ensure that Flex-ANI was functioning properly and that it was receiving the payphone-specific coding digits.

Remarkably, USS conceded at trial that it had done absolutely nothing to test and coordinate Flex-ANI with L3, either before this lawsuit was filed or even after the filing of the lawsuit put USS on notice of a problem. Specifically, USS representative Daniel Anderson admitted that USS did not discuss Flex-ANI ordering with L3 and saw no documents indicating that L3 had ordered Flex-ANI, which means USS had no basis for knowing whether L3 ordered Flex-ANI from every LEC or not. (Tr.544:1-18; 545:2-4). Similarly, USS did not engage in any testing with L3 to ensure that L3 was passing on the coding digits to USS, and did not consider or even discuss doing so. (Tr.556:7-557:7).

In addition, Mr. Brooks testified based on his review of USS's call data that USS easily could have matched its call data against a list of payphone ANIs, which would have led USS to discover that there was a population of completed calls for which USS had not received coding

1 Q Now, neither you nor anyone else within U.S. South
2 discussed with Level 3 whether Level 3 had ordered Flex-ANI,
3 right?

4 A That's correct.

5 Q And you have not seen any documents indicating that Level
6 3 had, in fact, ordered Flex-ANI, have you?

7 A No, sir.

8 Q Level 3 hasn't provided any notices to U.S. South to the
9 effect that it has ordered Flex-ANI, has it?

10 A Not that I'm aware of.

11 Q Level 3 hasn't provided U.S. South with any assurances or
12 guarantees that it's ordered Flex-ANI, correct?

13 A Not that I'm aware.

14 Q In fact, even after this lawsuit was filed, it's correct,
15 is it not, that no one at U.S. South other than outside
16 counsel has had any conversation with Level 3 to find out
17 whether Level 3 ordered Flex-ANI?

18 A That is correct.

19 Q So you would agree with me, I take it from the answers to
20 the last four or five questions, that U.S. South has no way of
21 knowing one way or the other whether Level 3 has ordered
22 Flex-ANI from the originating LECs?

23 A I do not know that.

24 Q And when you say "you," you're speaking on behalf of U.S.
25 South?

1 A Speaking on behalf of the organization, yes.

2 Q The organization really doesn't know whether or not U.S.
3 South ordered -- whether Level 3 ordered Flex-ANI?

4 A That is correct.

5 Q And, in fact, there haven't been any conversations with
6 Level 3 about whether Level 3 ordered Flex-ANI, even though
7 U.S. South is aware that it's receiving calls at its switch
8 from plaintiffs' payphones without payphone-specific coding
9 digits, right?

10 MR. MANISHIN: Objection. Argumentative.

11 THE COURT: Overruled. You may answer.

12 THE WITNESS: Say it one more time, please?

13 BY MR. HOTCHKISS:

14 Q Sure. You have told me that there have been no
15 discussions between U.S. South and Level 3 about ordering
16 Flex-ANI and whether Level 3 ordered Flex-ANI. My question to
17 you now is:

18 That's true, even though U.S. South is aware that it
19 is receiving calls from plaintiffs' payphones without Flex-ANI
20 payphone-specific coding digits, correct?

21 A We've not had the conversation because we are receiving
22 Flex-ANI from Level 3.

23 Q U.S. South hasn't made any changes to its call tracking
24 system in response to this case; is that right?

25 MR. MANISHIN: Objection, Your Honor. That's

1 THE COURT: Well, just ask the next question and we
2 will see whether or not it's relevant.

3 BY MR. HOTCHKISS:

4 Q Have there been any discussions between Level 3 and U.S.
5 South regarding Level 3's call tracking system?

6 A No, sir.

7 Q U.S. South has not engaged in any sort of testing with
8 Level 3 to make sure that it's receiving the Flex-ANI digits,
9 correct?

10 A Not testing. We get data from Level 3 every day that
11 incorporates calls with Flex-ANI digits.

12 Q My question to you isn't whether you are getting data
13 every day. It's whether you've engaged in some sort of
14 testing where you are interacting with Level 3 to make sure
15 that you're getting the coding digits?

16 MR. MANISHIN: Objection. It mischaracterizes the
17 witness' testimony. It's cumulative and it's argumentative.

18 THE COURT: Overruled. You may answer.

19 THE WITNESS: No. We have not.

20 BY MR. HOTCHKISS:

21 Q U.S. South also has not evaluated whether it needs to
22 implement a testing system that it would incorporate Level 3,
23 true?

24 A Say that again, please?

25 Q Sure. You've told me that U.S. South hasn't engaged in

1 any testing with Level 3 to make sure that it's getting the
2 Flex-ANI coding digits.

3 My question now is: U.S. South hasn't considered
4 doing that, has it?

5 A Not as of late.

6 Q Not as of late? Did it --

7 A No. We have not discussed it at all.

8 Q You testified a little bit about the answer supervision
9 data that comes back to you once a call either has or has not
10 been completed. Do you recall your testimony on that?

11 A Yes, sir.

12 Q And we've already established that the answer supervision
13 data that comes back is either a zero for an incomplete call
14 or a number above zero for a completed call, right?

15 A I believe so, yes.

16 Q I didn't understand your testimony -- well, I understood
17 you to say that the carriers in the call path have access to
18 that answer supervision data on whether the call was
19 completed. Did I understand your testimony correctly?

20 A I'm trying -- without being too technical?

21 Q Please.

22 A Which I don't know if I can, Your Honor. I apologize.

23 Signaling -- there is a network, a data network that
24 runs outside of the voice network that all carriers subscribe
25 to. When you dial a call, it's called "look ahead routing."

EXHIBIT 2



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Atlantax Client Information	08/07/2007
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Atlantax Client Information	10/31/2007
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Atlantax Audit 2009	11/18/2009
Atlantax Client Information	07/20/2010
BBCOM	03/29/2011
BBCOM 10q01 CFO Certification	07/20/2010
BBCOM 10q02 CFO Certification	03/29/2011
BTS	03/29/2011
BTS Audit	09/16/2004
BTS 2005 Audit	09/29/2005
BTS 2006 Audit	12/15/2006
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BTS 06q02 CFO Certification	05/07/2007
BTS 06q03 CFO Certification	05/07/2007
BTS 06q04 CFO Certification	05/07/2007
BTS 07q01 CFO Certification	07/02/2007
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Cinergy	05/29/2007
Cinergy 06q01 CFO Certification	12/15/2006
Cinergy 06q02 CFO Certification	12/15/2006
Cinergy 06q03 CFO Certification	05/29/2007
Cinergy 06q04 CFO Certification	05/29/2007
GlobalPhone	03/29/2011
GlobalPhone Audit	12/10/2004
GlobalPhone Attestation Letter	12/10/2004
GlobalPhone 06q01 CFO Certification	05/07/2007
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GlobalPhone 06q03 CFO Certification	05/07/2007
GlobalPhone 06q04 CFO Certification	05/07/2007
GlobalPhone 10q04 CFO Certification	03/29/2011
Iowa Communications	03/29/2011

	Audit Report	02/08/2006
	Iowa 09q04 CFO Certification	07/20/2010
	Iowa 10q01 CFO Certification	07/20/2010
	Iowa 10q04 CFO Certification	03/29/2011
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	ILD 09q01 CFO Certification	10/26/2009
	ILD 09q02 CFO Certification	10/26/2009
	ILD 10q01 CFO Certification	07/20/2010
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	Logical Telecom	07/20/2010
	Logical 2007 Audit	06/11/2008
	Logical 10q01 CFO Certification	07/20/2010
	Mastercall	05/07/2007
	Mastercall 06q01 CFO Certification	05/07/2007
	Mastercall 06q02 CFO Certification	05/07/2007
	Mastercall 06q03 CFO Certification	05/07/2007
	Mastercall 06q04 CFO Certification	05/07/2007
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	Nobel Audit	09/16/2004
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	Nobel 06q01 CFO Certification	05/07/2007
	Nobel 06q02 CFO Certification	05/07/2007
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	Nobel 06q04 CFO Certification	05/07/2007
	TeleNational	10/31/2007
	Telenational DAC Report	09/13/2005
	Telenational 06q01 CFO Certification	05/07/2007
	Telenational 06q02 CFO Certification	05/07/2007
	Telenational 06q03 CFO Certification	05/07/2007
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	Telenational 07q02 CFO Certification	10/31/2007
	Union Telephone	03/29/2011
	Union Telephone 07q01 CFO Certification	07/02/2007
	Union Telephone 10q04 CFO Certification	03/29/2011
	U.S. South	10/31/2007
	U.S. South Audit	01/23/2005
	U.S. South 2005 Audit	03/21/2006
	U.S. South 06q01 CFO Certification	05/29/2007
	U.S. South 06q02 CFO Certification	05/29/2007
	U.S. South 06q03 CFO Certification	05/29/2007
	U.S. South 06q04 CFO Certification	05/29/2007
	U.S. South 07q01 CFO Certification	10/31/2007
	Vertex Telecom	03/29/2011

Vertex 06q03 CFO Certification	05/07/2007
Vertex 06q04 CFO Certification	05/07/2007
Vertex June 2007 Audit Report	06/14/2007
Vertex FCC Statement	06/14/2007
Vertex 07q01 CFO Certification	07/02/2007
Vertex 07q02 CFO Certification	10/31/2007
Vertex 07q04 CFO Certification	06/11/2008
Vertex 08q01 CFO Certification	07/28/2008
Vertex 08q02 CFO Certification	11/20/2008
Vertex 08q04 CFO Certification	10/26/2009
Vertex 09q01 CFO Certification	10/26/2009
Vertex 09q02 CFO Certification	10/26/2009
Vertex 10q01 CFO Certification	07/20/2010
Vertex 10q02 CFO Certification	03/29/2011
Vertex 10q03 CFO Certification	03/29/2011
Vertex 10q04 CFO Certification	03/29/2011

EXHIBIT 3

A. Appellees Satisfied Their Burden of Proving That the Absence of Coding Digits Was More Likely Than Not Due to the Fault of USS or L3.

USS contends that Appellees "offered no evidence showing, or even suggesting, that the lack of correct Flex-ANI information on the disputed calls was caused by anything U.S. South or L3 did." (OB:37-38). As demonstrated below, Appellees did exactly that. Through the expert report and trial testimony of Paul Brooks and the voluminous call data Mr. Brooks reviewed, Appellees introduced substantial evidence that proved four key points USS failed to rebut:

- (1) Appellees' originating LECs were transmitting payphone-specific coding digits for calls made from the same ANIs from which USS claimed not to receive the coding digits, which proves that Appellees fulfilled their responsibility under the Payphone Orders by ordering payphone lines with Flex-ANI coding digits capability;
- (2) Other completing carriers were able to identify calls made from the same ANIs during the same time period as having been made from Appellees' payphones, which proves these other completing carriers (who also use the Flex-ANI

capability) received the payphone-specific coding digits from their IXC;

- (3) L3 was able to identify as originating from Appellees' payphones the very same calls for which USS claimed not to receive the coding digits, thereby proving that L3 received the coding digits for the calls at issue; and
- (4) USS did absolutely nothing to fulfill its duty to test and coordinate Flex-ANI with L3 to ensure that it was receiving payphone-specific coding digits from L3.

Collectively, these un rebutted points carried Appellees' evidentiary burden of demonstrating that USS's failure to receive the payphone-specific coding digits for the calls at issue more likely than not was the fault of USS or L3 rather than Appellees or their originating LECs.

1. Evidence That Appellees' LECs Were Transmitting Payphone-Specific Coding Digits

In his expert report, Mr. Brooks concluded that:

[M]any other completing carriers were able to track and pay per-call compensation for calls originated from the same payphone lines and for the same periods that USS's reports allege no coding digits were received. ... This fact alone proves that the disputed ANIs were properly transmitting the coding digits for calls that USS's tracking system tagged as having no payphone coding digits.

(GCB IRA, Exhibit A, p.4, ¶2). Mr. Brooks offered this same opinion at trial. (Tr.106:12-107:22). Specifically, Mr. Brooks testified that because other carriers were completing and paying for calls made from the same payphone ANIs during the same period of time as USS claimed not to be receiving the coding digits, Flex-ANI must have been properly provisioned by Appellees' originating LECs. (Tr.102:4-15; 103:14-20).

Mr. Brooks' opinion was based on the data set forth in Tabs 6 and 7 of his expert report. (See GCB IRA, Exhibit A, Tabs 6 & 7). Tabs 6 and 7 are data Mr. Brooks (in his capacity as Appellees' aggregator¹⁶) received from National Payphone Clearinghouse ("NPC") regarding calls originated from Appellees' payphones and completed by other carriers. (Tr.89:14-20; 90:6-11; 102:16-25). More specifically, Tabs 6 and 7 are subsets of the NPC call data that Mr. Brooks created by: (1) segregating the data for only those calls made from Appellees' payphones, and then (2) further segregating the data to create a subset of only those calls made from the ANIs in dispute. (Tr.93:17-95:1; 98:8-11; 102:16-25).

Mr. Brooks analyzed the payphone ANIs from which the disputed calls were made for the third quarter of 2005 (Tab 6) and the first quarter of

¹⁶ Mr. Brooks' company, PSP Processing, has processed Appellees' dial around compensation claims since 2005 (Tr.35:21-25; 36:1-7), which means that Mr. Brooks has firsthand knowledge of Appellees' dial around compensation practices.

2007 (Tab 7). (Tr.103:1-13). Mr. Brooks selected these two quarters for his analysis because USS produced a document in discovery (admitted as Plaintiff's Exhibit 7) analyzing the ANIs from which the disputed calls were made for those same two quarters. (Tr.103:1-13). Thus, by analyzing call data for the same two quarters analyzed by USS, Mr. Brooks was engaging in an "apples to apples" comparison.

Mr. Brooks concluded that Appellees' originating LECs were transmitting payphone-specific coding digits on calls made from the same ANIs for which USS claimed it was not receiving the coding digits. (Tr.103:21-24). Significantly, Mr. Brooks also concluded that the reason USS did not receive payphone-specific coding digits for the calls at issue could not possibly have been that Appellees' originating LECs were not transmitting the coding digits. (Tr.147:6-16).

In addition, Mr. Brooks, again relying on the NPC call data attached as Tabs 6 and 7 of his expert, concluded that other completing carriers were receiving payphone-specific coding digits for calls made from the same ANIs during the same period of time as USS claimed not to be receiving the coding digits. (Tr.98:25-99:6; 102:16-103:24). This conclusion is the logical converse of Mr. Brooks' opinion that Appellees' originating LECs were transmitting the payphone-specific coding digits, i.e., not only were the

LECs transmitting the digits, but other completing carriers were receiving them.

Mr. Brooks' conclusion that other completing carriers were receiving the coding digits at the same time USS was not is damning to USS. First, the other completing carriers also use Flex-ANI to identify calls as coming from payphones. (Tr.92:3-5; Tr.668:6-12). Therefore, as USS's expert conceded, the fact that these other carriers were paying Appellees for calls made from the same ANIs for the same period of time meant that the other carriers were receiving payphone-specific coding digits. (Tr.667:14-23). Second, as USS's expert conceded, because other completing carriers were receiving the coding digits, their IXC's also must have been receiving the coding digits. (Tr.669:12-22). Collectively, these concessions prove that the reason why payphone-specific coding digits were not captured at USS's switch had to be the fault of either L3 or USS itself because, as between USS on the one hand and the other completing carriers on the other hand, the only variables that differed are the identify of the completing carrier (USS) and the identify of the IXC (L3). All of the other variables -- the payphone owner, the ANIs from which the calls were made, the time period when the calls were made, the use of Flex-ANI to identify the calls as having been made from a payphone -- are identical.

2. Evidence Regarding L3's Data for the Calls at Issue

In his expert report, Mr. Brooks further concluded:

US South's underlying carrier, Level 3, produced intermediate carrier reports, which were based on FLEX ANI that tracked and reported the very same calls that USS claims were not tagged with the proper code.

(GCB IRA, Exhibit A, p.4, ¶2). Mr. Brooks testified that as an intermediate carrier, L3 is required to report to PSPs regarding calls that it routes to another carrier for completion. (Tr.108: 11-25). This report, known as an "intermediate carrier report," must include the ANIs from which the calls were made and the volume of calls per ANI. (Tr.108:15-25; 109:14-16). The intermediate carrier report allows a PSP to compare the volume of calls routed to a particular completing carrier with the volume of calls paid by that carrier. (Tr.109:5-13; 270:15-271:8).

Mr. Brooks based his opinion on his review and analysis of call data provided by NPC on behalf of L3 from the third quarter of 2005 through the third quarter of 2008 regarding calls made from Appellees' payphones that L3 passed off to USS for completion, which data was produced as Tab 1 to Mr. Brooks' expert report. (Tr.111:4-14; 113:4-13).¹⁷ In Tab 2 of his expert

¹⁷ Mr. Brooks confirmed in his trial testimony that Tab 1 to his expert report contained all of the actual data he received regarding calls made from Appellees' payphones and sent by L3 to USS for completion without manipulation of the data in any way. (Tr.112:24-113:20). Due to the

report, Mr. Brooks compared on an ANI by ANI basis the calls L3 reported were passed off to USS (as derived from Tab 1) with the outbound calls captured by Appellees' payphones. (Tr.115:22-25). In some cases, however, Appellees had no call data for a particular ANI because not all of their payphones are capable of capturing call data. (Tr.120:10-15). Therefore, to better assess how closely L3's call counts matched Appellees' call counts, Mr. Brooks: (1) discarded any ANIs for which Appellees did not have call data, and (2) in Tab 3 of his expert report, he compared Appellees' call counts for the remaining ANIs with L3's call counts for those same ANIs. (Tr.120:10-121:1). As a final level of refinement, Mr. Brooks compared the respective call counts in Appellees' call data and L3's call data for the calls at issue for the third quarter of 2005 (Tab 4) and the first quarter of 2007 (Tab 5). (Tr.134:3-19; 138:20-139:7). In each case, Mr. Brooks concluded that Appellees' call counts and L3's call counts matched within an acceptable level of tolerance, which means the two call counts were for the same pool of calls. (Tr.136:7-22; 139:8-140:9).

voluminous nature of this data, which initially was provided to USS in electronic form along with Mr. Brooks' expert report, the District Court requested that Appellees create a representative sample of the data for use as a trial exhibit. (GCB IRA, Exhibit 65, ¶1). That is why Tab 1 to Mr. Brooks' report, as admitted at trial, contains only three pages of call data. (Tr.114:1-12).

In fact, the only reason these calls were included in L3's intermediate carrier reports at all is because they were identified as having been made from a payphone based on the presence of payphone-specific coding digits. Thus, the fact that Appellees' and L3's call counts matched demonstrates that: (1) L3 received payphone-specific coding digits for the disputed calls, and (2) L3 was able to identify those calls as having been made from payphone ANIs owned by Appellees. Again, this means Appellees proved through a preponderance of the evidence that the problem with the coding digits must have been with either L3 or USS, not with Appellees or their originating LECs.

3. Evidence Regarding USS's Failure to Coordinate and Test Flex-ANI with L3

Mr. Brooks further opined that USS had an obligation to coordinate and test Flex-ANI with L3 to ensure that it was working properly. (Tr:82:3-11; 82:18-84:1). Mr. Brooks' opinion in this regard was based on the following language from the FCC's Coding Digits Waiver Order:

LECs and PSPs must transmit payphone-specific coding digits as soon as they are technically capable, and no later than the waivers they have been granted. We note, however, that *IXCs must request, test, and coordinate with LECs to obtain this service under carrier to carrier procedures to ensure that there are no problems in providing and receiving the FLEX ANI digits for a particular IXC or LEC.*

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2011, the foregoing Reply Comments was sent via electronic mail with a printed copy sent by first-class U.S. Postal Service to the following:

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